

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Pay Telephone)	
Reclassification and Compensation)	
Provisions of the Telecommunications)	CC Docket No. 96-128
Act of 1996)	
)	
Petition for Rulemaking or, in the)	
Alternative, Petition to Address Referral)	
Issues in Pending Rulemaking)	

OPPOSITION OF EMBARQ

Petitioners Martha Wright, et al. (Petitioners) are seeking to have the Commission intervene in and ultimately resolve a political question that is wholly outside of the Commission's expertise, namely, at what rate should state correctional facilities permit inmates to make telephone calls. Even a cursory review of Petitioners' Alternative Rulemaking Proposal (Proposal) reveals that the heart of their complaint is with the fees inmate service providers must pay to prison facility operators in order to win contracts to provide inmate calling services. The Commission has recognized that these fees are the cause of high inmate calling rates, and that the solution lies with the states rather than Commission rate regulation.

Moreover, it is incontrovertible that states have the power to prohibit inmate calling altogether, so they must have the power to cause rates to be high. Nobody, including Petitioners, argues that inmate service providers, such as Embarq, are receiving unjust or unreasonable profits from inmate calling. It is apparent, therefore, that the Proposal does not address a Communications Act problem; rather the Commission is being presented with a state political

question that should be resolved, and routinely is resolved, through state political processes. In fact, the facts in Petitioners' own Proposal provides several examples of such resolution.

The record in this docket will readily demonstrate the state political nature of the Petitioners' Proposal, and the inappropriateness of Commission action. In particular, the Commission should conclude, and not for the first time, that (1) inmate calling is a unique and highly competitive business; (2) the Commission lacks the authority to adopt the Petitioners' Proposal; and (3) Petitioners' Proposal is a bad idea, as is any effort to regulate inmate calling rates. Accordingly, the Commission should deny Petitioners' Proposal and allow state political processes to work.

I. INMATE CALLING IS A UNIQUE AND HIGHLY COMPETITIVE BUSINESS

As the Commission has observed, and will note again, inmate calling is a unique and highly competitive market. First, the costs of providing service are higher than in other markets, notably because of the need for equipment that is unique to the service. The service provider incurs significant installation and ongoing expenses for onsite technicians, workstations for investigators to monitor and manage calls, validations of called parties, billing arrangements for called parties and/or costs of administering debit account systems, just to name a few. The prison facility itself also incurs substantial costs unique to the inmate calling service, such as administration of personal identification numbers, site management of facilities, management of inmates back and forth to the phones, investigators on line to monitor calls and intercept illegal activity being conducted on phones, etc. Therefore, Petitioners' general statements about the unreasonableness of inmate calling rates are simply unfounded.¹

¹ *E.g.*, Petitioners' Alternative Rulemaking Proposal, at 10-11, 17-18.

Many of the unique added costs in the inmate calling business are derived from the need for security. As the National Sheriffs Association explained, the facility must ensure that it does not “lose control over the monitoring and tracking of inmate calling, which frequently results in criminal activity and massive fraud.”² Moreover, providers are called upon “to assist law enforcement officials with ongoing criminal investigations or to monitor the phone calls of suspected terrorists.”³ While Petitioners’ acknowledge these factors when they compare inmate calling rates between jurisdictions,⁴ they incorrectly assume that the Commission can or should second guess different jurisdictions choices when it comes to monitoring. The Commission cannot decide what costs are appropriate for monitoring inmate calling; nor should it attempt to do so as this is best left to the prison authorities, who have expertise in such matters.

Petitioners focus extensively on the high fees many states demand from inmate calling service providers, which are typically calculated as commissions based on a percentage of revenues. Indeed, the Proposal should be seen primarily as an effort to induce the Commission to force reductions in the fees paid to prison facilities, as evidenced by the request for a “fresh look” period to renegotiate contracts.⁵ These fees support programs; they are not properly treated as profits for determining whether rates are reasonable under section 201.⁶ In fact, as the National Sheriffs Association explained recently,

² Letter dated April 9, 2007 from Sheriff Ted Kamatchus, President, National Sheriffs Association to The Honorable John Dingell and The Honorable Joe Barton, Committee on Energy and Commerce, United States House of Representatives (National Sheriffs Letter).

³ *Id.*

⁴ Petitioners’ Alternative Rulemaking Proposal, at 18-20.

⁵ *Id.* at 28-29.

⁶ 47 U.S.C. § 201. The Commission did determine that fees paid to facility owners are properly treated as profits rather than costs with respect to the section 276 requirement that payphone providers be fairly compensated. *Implementation of the Pay Telephone*

These commissions are a primary source of financial support for a multitude of beneficial inmate programs such as inmate welfare funds, antirecidivism programs, AIDS education, basic adult education, substance abuse programs and child abuse prevention programs. Without these commissions, many jails would be unable to fund these programs which directly benefit the inmates.⁷

Nor do single provider contracts indicate anything less than a robustly competitive market.

Prisons are just like most businesses, consumers and other locations in this country in choosing a single provider from among many potential vendors. In this case, a single source is even more vital as it is the only way to ensure security and prevent fraud.

In any event, the market for inmate calling is highly competitive so the Commission would be acting outside its authority were it to attempt to force a reduction in the fees inmate service providers pay to prison administrators. Embarq typically faces several providers competing to win business every time it pursues a service contract. This competitiveness is reflected by the fact that there are no allegations that service providers are reaping windfall profits. In fact, service providers are offering service at competitive rates and competition is so strong that many major providers are exiting the market—LECs larger than Embarq already have left, or are leaving the business. Accordingly, there is no legal or policy justification for Commission action; it is not the Commission's role to replace the competitive market with a different solution simply because some people dislike the competitive result.

Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Remand, 17 FCC Rcd 3248, 3256 ¶ 15 (2002) (*Inmate Calling Order*). That analysis is fundamentally different from determining whether the service provider is making a profit, however, with respect to the section 201 requirement that rates be just and reasonable because it concerns a rate floor rather than a rate ceiling. In fact, commissions paid to state authorities are analogous to taxes and, as such, they should not form the basis for a determination that a rate is not just and reasonable.

⁷ National Sheriffs Letter.

II. THE COMMISSION LACKS THE AUTHORITY TO ADOPT THE PETITIONER'S PROPOSAL

The clear objective of Petitioners' proposal is to reduce inmate calling commissions—fees paid to state governments and prison operators. This objective is outside the Commission's authority, however, because the Commission does not have authority over the fees paid to state governments and prison operators. The Commission regulates communications; it does not regulate the terms and conditions under which prisons choose to allow telecommunications service providers to offer service in their institutions. That is a matter for state governments and the political processes within the respective states. As the Commission pointed out in 2002:

any solution to the problem of high rates for inmates must embrace the states. States are encouraged to examine the issue of the significant commissions paid by [inmate calling service] ICS providers to confinement facilities and the downward pressure that these commissions have on ICS providers' net compensation and, more important, the upward pressure they impose on inmate calling rates.⁸

State governments actually have the authority to deprive inmates of calling privileges altogether. Accordingly, they also have the authority to charge high rates, or extract high commission payments from service providers. If a state chooses to make inmate calling expensive, that is within its rights. Petitioners can disagree with the decision, but they cannot point to a source of Commission authority for intervening or preventing the state from exercising its corrective authority in this way.

The only possible sources of Commission authority are the section 201⁹ requirement that rates be just and reasonable and the section 276¹⁰ requirement that payphones be competitively

⁸ *Inmate Calling Order*, 17 FCC Rcd at 3261 ¶ 29.

⁹ 47 U.S.C. § 201.

¹⁰ 47 U.S.C. § 276.

provided and widely available. Neither provision supports Petitioners' Proposal. There is no evidence that inmate service providers are making anything greater than normal competitive profits, so rates are just and reasonable under section 201. Similarly, there is robust competition and widespread availability under section 276. Accordingly, there is no compelling reason for Commission action. Instead, the issue on inmate calling rates is one of state public policy, to be resolved through the state political process.

III. PETITIONERS' PROPOSAL IS A BAD IDEA, AS IS ANY EFFORT TO REGULATE INMATE CALLING RATES

The Commission should not second-guess, much less, interfere with state political determinations regarding the availability of inmate calling and the appropriate commissions to be derived from such calling. Regulation should not supplant markets, including the political process. The Commission declined to impose regulated rates on inmate calling in the *Inmate Calling Order*,¹¹ and it should do the same here.

Petitioners have a clear avenue for achieving their objectives through state political processes. Indeed, the Proposal contains several examples of substantial reductions in rates for inmate calling.¹² Petitioners should follow those examples and continue to make their case in state political arenas, and the Commission should reject their effort to short-circuit the process.

It is not clear that Petitioners' Proposal makes sense even by its own stated objectives—reducing fees to prison authorities to provide cheaper calling to inmates and their families. The pervasive rate regulation called for in the Proposal could lead some states to severely curtail

¹¹ 17 FCC Rcd 3248.

¹² Petitioners' Alternative Rulemaking Proposal, at 3.

inmate calling, or even eliminate it altogether. In fact, Texas still sharply limits inmate calling¹³ and other states could easily resolve the state policy calculation in a similar fashion should regulation force lower rates. Not only would this be undesirable, it would also work against the Communications Act policies for payphones. In section 276 of the Communications Act, Congress clearly expressed a preference for competition—which is prevalent in markets for inmate calling—and widespread availability of payphones. The Commission should not, therefore, adopt Petitioners' Proposal, as it would reduce the availability of payphones.

IV. CONCLUSION

The Commission should conclude, and not for the first time, that (1) inmate calling is a unique and highly competitive business; (2) the Commission lacks the authority to adopt the Petitioners' Proposal; and (3) Petitioners' Proposal is a bad idea, as is any effort to regulate inmate calling rates. Accordingly, the Commission should deny Petitioners' Proposal and allow state political processes to work.

Respectfully submitted,

EMBARQ

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¹³ See <http://www.tdcj.state.tx.us/publications/cid/OffendOrientHbkNov04.pdf>.